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No 491

Supreme Court of the United States.

OCTOBER TERM, 1946.

BOSTON AND MAINE RAILROAD,
Petitioner,

v.

ELIZABETH B. MEECH, ADMINISTRATRIX,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

AND

BRIEF IN SUPPORT THEREOF.

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Supreme Court of the United States.

OCTOBER TERM, 1946.

BOSTON AND MAINE RAILROAD,
Petitioner,
v.
ELIZABETH B. MEECH, ADMINISTRATRIX,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

The petitioner, Boston and Maine Railroad, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the First Circuit entered in the above entitled case on June 12, 1946, affirming a judgment entered in the District Court of the United States for the District of Massachusetts upon a jury's verdict for the respondent in the sum of $23,400.

Opinion Below.

The opinion of the Circuit Court of Appeals (R. pp. 123-127) was filed June 12, 1946; petitioner's motion to stay the mandate was allowed June 13, 1946. The opinion is reported in 156 F. (2d) 109.

Statement.

This is an action under the Federal Employers' Liability Act brought by the respondent, Elizabeth B. Meech, Administratrix, to recover compensation for herself and minor children because of the death of her husband, an employee of the petitioner, on June 28, 1944, in the defendant's railroad yard at East Deerfield, Massachusetts.

The complaint contains two counts (R. pp. 1-3, 5-6). The first count (R. pp. 1-3) alleges negligent operation of a locomotive by an employee or employees of the defendant, and specifies the negligence as follows: "in that they failed to see or to warn the intestate of the approach of said locomotive or to take any other means to avoid striking him." The second count, added by amendment (R. pp. 5-6), alleges an unsafe place to work, and specifies the negligence as follows: "that said platform was not a reasonably safe place for said Meech to work in that parts of passing locomotives overhung the platform and did strike persons and objects thereon; and that the intestate had no knowledge of and was not warned of the unsafe and dangerous condition existing."

The defendant's answer (R. pp. 3-5), among other things, denies that the decedent was injured through any negligence of the defendant.

The case was tried before Wyzanski, J., and a jury on November 6, 8, and 9, 1945 (R. p. 6), in the District Court of the United States for the District of Massachusetts.

At the close of the evidence the petitioner duly and seasonably filed a motion for a directed verdict on each count of the complaint (R. pp. 7-9). This motion was denied (R. pp. 7, 92) and the petitioner's rights were saved (R. p. 92).

The petitioner duly and seasonably requested the court to instruct the jury as follows (R. p. 118):

"19. The defendant owed no duty to have a lookout stationed on the rear end of the tender as it was backing toward the washstand."

"27. The defendant owed no duty to blow a whistle, it would only add to the confusion."

These instructions the court refused to give, and to this refusal the petitioner duly excepted (R. p. 110).

The case was submitted to the jury on both counts of the complaint. The jury returned a general verdict for the respondent in the sum of $23,400 (R. p. 9), and judgment was entered for the respondent in this sum with costs (R. p. 10).

From the judgment for the respondent the petitioner claimed an appeal to the Circuit Court of Appeals for the First Circuit (R. pp. 10, 115).

The judgment of the District Court, rendered on November 9, 1945 (R. p. 10), on the jury's verdict for the respondent, was affirmed by the Circuit Court of Appeals for the First Circuit on June 12, 1946 (R. p. 127), on the ground (R. p. 126) that "although some precautions were taken for the decedent's safety, *further precautions were possible*" (italics ours); and on the ground that the petitioner's 19th and 27th requests for instructions were properly denied (R. p. 127).

The decedent, just prior to his death, was standing on the edge of a washstand near a track on which the locomotive which hit him was backing from the east. At the time he was injured, the decedent was watching a locomotive on another track which was going in a westerly direction toward the turntable. Thus he was standing with his back toward the locomotive which struck him. While the accident happened about 1.45 a.m. (R. pp. 43, 56), the undisputed evidence shows that the weather was clear, and that the locus

of the accident was brightly illuminated by stationary electric lights (R. pp. 71, 87-91, 125).

Jurisdiction.

The District Court of the United States had jurisdiction of the cause of action under the Federal Employers' Liability Act, U.S.C. Title 45, c. 2, §§ 51 *seq.;* the Circuit Court of Appeals had appellate jurisdiction to review by appeal the final decision of the District Court under U.S.C. Title 28, § 225; and this court has jurisdiction under U.S.C. Title 28, § 347 (Judicial Code, § 240 (a), as amended by the Act of February 13, 1925).

Questions Presented.

The questions presented are:

1. Was the Circuit Court of Appeals in error in adopting under the first count of the complaint the standard of duty and in applying the test of liability set out in its opinion (R. p. 126) as follows:

> "It may be that the locomotive was being operated in the way usual and customary for the maneuver which resulted in the death of the decedent, but nevertheless the fact remains that *it could have been operated more carefully. Another man could have been assigned to ride with the hostler to keep a lookout from the fireman's side of the cab or from the rear of the tender* for workmen in the vicinity of the engine house, who might be presumed to be busy and hence inattentive at times to their own safety, or *the whistle on the locomotive could have been sounded* as it drew into the washstand to warn the man assigned there, as the decedent had been, to 'strip' it. . . .

"From the foregoing, it is clear that although some precautions were taken for the decedent's safety, *further precautions were possible*"? (Italics ours.)

2. Was the Circuit Court of Appeals in error in ruling (R. p. 126) that the jury was warranted in finding under the first count that there was a breach of duty by the petitioner to the decedent by reason of the fact that "no whistle signal was given from the locomotive as it approached the washstand" (R. p. 125)?

3. Was the Circuit Court of Appeals in error in ruling (R. p. 126) that the jury was warranted in finding under the first count that there was a breach of duty by the petitioner to the decedent by reason of the carrier's failure to have "another man . . . assigned to ride with the hostler to keep a lookout from the fireman's side of the cab or from the rear of the tender" (R. p. 126)?

4. Was the Circuit Court of Appeals in error in ruling (R. p. 126) that the jury was warranted in finding under the first count negligent operation by the hostler by reason of the carrier's failure to assign "another man . . . to ride with the hostler to keep a lookout from the fireman's side of the cab or from the rear of the tender," in view of the pleadings, which limit the negligence under the first count to negligence of the hostler and not to negligence of the petitioner?

5. Was the Circuit Court of Appeals in error in adopting under the second count of the complaint the standard of duty and in applying the test of liability set out in its opinion (R. p. 126) as follows:

"The sufficiency of the evidence to support the verdict on the second count is at least equally clear. The

defendant *might have painted lines on the platforms of its washstand* to indicate the extent to which locomotives overhang them, and thus to warn persons on the platforms of the danger incident to standing near their inner borders, or it *might even have set the platforms of its washstand back from the tracks far enough to prevent locomotives from overhanging them at all.*

"From the foregoing, it is clear that although some precautions were taken for the decedent's safety, *further precautions were possible*" (italics ours)?

6. Was the Circuit Court of Appeals in error in ruling (R. p. 126) that the jury was warranted in finding under the second count that there was a breach of duty by the petitioner to the decedent by reason of its failure "to paint lines on the platforms of its washstand"?

7. Was the Circuit Court of Appeals in error in ruling (R. p. 126) that the jury was warranted in finding under the second count that there was a breach of duty by the petitioner to the decedent by reason of its failure to set "the platforms of its washstand back from the tracks far enough to prevent locomotives from overhanging them at all"?

8. Was the Circuit Court of Appeals in error in making the following ruling (R. p. 126):

"Although some precautions were taken for the decedent's safety, further precautions were possible, and from this it follows, as we read the decisions cited above, that there is an 'evidentiary basis' for submitting the issue of the defendant's causal negligence to the jury, and hence that our 'function is exhausted' "?

9. Was the Circuit Court of Appeals in error in ruling (R. p. 127) that the defendant's 19th request for instruction was properly denied? The request is as follows:

> "19. The defendant owed no duty to have a lookout stationed on the rear end of the tender as it was backing toward the washstand."

10. Was the Circuit Court of Appeals in error in ruling (R. p. 127) that the defendant's 27th request for instruction was properly denied? The request is as follows:

> "27. The defendant owed no duty to blow a whistle, it would only add to the confusion."

11. Was the Circuit Court of Appeals in error in affirming the judgment of the District Court?

Reasons Relied on for Allowance of the Writ.

The petition for writ of certiorari should be granted in this case for the following reasons:

1. Because the decision of the Circuit Court of Appeals is in conflict with the decisions of other Circuit Courts of Appeals.

2. Because the decision of the Circuit Court of Appeals is in conflict with the decisions of state courts of last resort.

3. Because the Circuit Court of Appeals has decided an important question of Federal law in a way which is in conflict with applicable decisions of this court.

4. Because the Circuit Court of Appeals has applied a false standard of duty and test of liability under the Federal Employers' Liability Act.

5. Because the errors committed by the Circuit Court of Appeals have in effect converted the Federal Employers' Liability Act into a Workmen's Compensation Act, and have made the carrier an insurer of the safety of its employees. If allowed to stand, this judgment would constitute a miscarriage of justice.

The decisions that support these reasons are set out in the accompanying brief.

For the foregoing reasons, it is respectfully submitted that this petition should be granted.

BOSTON AND MAINE RAILROAD, *Petitioner*,
By its Attorney,
FRANCIS P. GARLAND.

Supreme Court of the United States.

OCTOBER TERM, 1946.

BOSTON AND MAINE RAILROAD,
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v.

ELIZABETH B. MEECH, ADMINISTRATRIX,
Respondent.

BRIEF FOR THE PETITIONER.

Opinion Below.

The opinion of the Circuit Court of Appeals is reported in 156 F. (2d) 109. It is printed in full on pages 122 to 127, inclusive, of the record accompanying this petition.

Jurisdiction.

The District Court of the United States had jurisdiction of the cause of action under the Federal Employers' Liability Act, U.S.C. Title 45, c. 2, §§ 51 *seq.;* the Circuit Court of Appeals had appellate jurisdiction to review by appeal the final decision of the District Court under U.S.C. Title 28, § 225; and this court has jurisdiction under U.S.C. Title 28, § 347 (Judicial Code, § 240 (a), as amended by the Act of February 13, 1925).

Statement of the Case.

The statement of the case appears at pages 2 to 4, inclusive, of the petition, and is made a part of this brief by reference.

Statement of Facts.

This fatal accident occurred June 28, 1944 (R. pp. 2, 25, 42), at about 1.45 a.m. (R. pp. 43, 56) at the petitioner's railroad yard at East Deerfield, Massachusetts, near its roundhouse (R. pp. 2, 11). The location is shown on a plan (Exhibit 1, R. pp. 11, 113). The decedent Meech was a machinist's helper (R. pp. 37, 44, 92), but on the night in question he was assigned about 11 o'clock to the duty of stripping and equipping engines (R. pp. 68, 92). This required him to take locomotive equipment, such as lanterns, oilers, and tools, off the locomotives (R. pp. 38, 61) after they came to a stop at the door of the equipment building (R. pp. 33, 36, 38, 52, 61). This was a simple job, requiring no particular skill; it was a laborer's job (R. p. 92).

There is only one track upon which locomotives were backed for stripping, and upon which locomotive 2719—the locomotive involved in the accident (R. pp. 46, 59, 61)—was backing (R. pp. 59, 72). This track runs substantially east and west, between two washstands (R. pp. 12, 36, 59, 72, Plan, Exhibit 1, R. p. 113). The distance between the rails is 4 feet 8½ inches, and the space between the edge of the washstand and the nearer rail on each side is 1.6 feet (R. p. 12). Locomotive 2719 would overhang from the rail 2 feet 8 inches (R. p. 16), and therefore would overhang the platform or washstand 1.2 feet (R. p. 16). The washstands were adequately lighted (R. pp. 13-14, 35, 43, 45, 60, 71, 73-74, 86-91), and the headlight on the rear of the tender was burning (R. pp. 30, 39, 45, 54, 59, 83).

From his work of stripping locomotives earlier that evening, the decedent knew that the locomotives backed up on the track between the washstands (R. pp. 41, 59, 72); *that the locomotives usually stopped opposite the door of the equipment building* (R. pp. 36, 38, 50); *that the equipment was then taken off on the engineer's side, the right side of the locomotive, on the northerly washstand* (R. pp. 52, 63); *that it was not customary to have anybody besides the hostler in the locomotive being backed down to have this work done* (R. pp. 62, 52); *and that there would be no one stationed on the rear of the tender* (R. pp. 45, 52). *He also knew that it was time for an engine to be stripped* (R. p. 41).

The engine was backing very slowly, 2 to 4 miles an hour (R. pp. 52, 53, 62); it was coming to a stop (R. p. 34) to have the equipment taken off (R. p. 52). The automatic bell was ringing (R. pp. 54-57, 59-60, 83, 86), and continued to ring from the time the hostler turned the valve on (R. p. 56) before he left the waterplug (R. p. 54), until the locomotive came to a stop (R. p. 54).

Moquin, the respondent's witness, testified (R. p. 53) that he did not at any time see the decedent. Nor was it possible for him to do so. He was on the engineer's side of the locomotive (R. pp. 51, 61, 64), and his view along the track on the fireman's side was obstructed by the height of the tender with the coal piled above it (R. pp. 51, 52, 62, 64) and by the overhang of the tender, which was 2 feet 8 inches from the rail (R. p. 16).

In this connection the hostler testified (R. p. 50) that the tender was filled with coal; that the coal would be 2 feet higher than the tender; that the coal pile would be at least 7 feet from the floor of the cab; that the part of the tender that carried the coal would be a good 10 feet, so that for 10 feet from the front of the tender there would be a pile of coal about 7 feet high; that he was stationed on the

right-hand side of the cab in the engineer's seat (R. p. 51); that from his position on the right side of the cab he could not see anything along the left side of the engine, *so that if there was anybody at any time behind the engine on the left side he would not be able to see him* (R. p. 52); that he could not see over the coal and could not see the washstand on the fireman's side (R. p. 62).

The only eyewitness to the accident was Kurtyka, a witness called by the respondent (R. p. 25), who was on locomotive 1458, which was on the first track of the spider (R. p. 26, Exhibit 1, R. p. 113), about 75 feet away from the washstand on which the decedent was standing (R. pp. 30, 34). Kurtyka was standing between the tender and the engine (R. p. 26), and saw the locomotive backing towards Meech on the track nearest the equipment building (R. p. 28). Meech was on the southerly washstand, turning towards the turntable (R. pp. 28-29). *The engine was stopping when he saw Meech standing near the edge of the washstand with his back toward the locomotive which hit him* (R. pp. 34, 37), and when he saw that Meech was not going to get out of the way of the locomotive, he hollered to him "Hey, Meech, watch out," or "look out" (R. pp. 31, 35), but Meech apparently did not hear him (R. p. 35), and he saw the locomotive hit him, and he fell down (R. p. 29). It was the rear end of the tender on the fireman's side which struck Meech (R. p. 29).

Specifications of Errors.

1. The Circuit Court of Appeals was in error in its treatment of the case under the first count of the complaint. It adopted a false standard of duty and applied a false test of liability, as set out in its opinion (R. p. 126) as follows:

> "It may well be that the locomotive was being operated in the way usual and customary for the maneuver

which resulted in the death of the decedent, but nevertheless the fact remains that *it could have been operated more carefully. Another man could have been assigned to ride with the hostler to keep a lookout from the fireman's side of the cab or from the rear of the tender* for workmen in the vicinity of the engine house, who might be presumed to be busy and hence inattentive at times to their own safety, or *the whistle on the locomotive could have been sounded* as it drew into the washstand to warn the man assigned there, as the decedent had been, to 'strip' it. . . .

"From the foregoing, it is clear that although some precautions were taken for the decedent's safety, *further precautions were possible.*" (Italics ours.)

2. The Circuit Court of Appeals was in error in ruling (R. p. 126) that the jury was warranted in finding under the first count that there was a breach of duty by the petitioner to the decedent by reason of the fact that "no whistle signal was given from the locomotive as it approached the washstand" (R. p. 125).

3. The Circuit Court of Appeals was in error in ruling (R. p. 126) that the jury was warranted in finding under the first count that there was a breach of duty by the petitioner to the decedent by reason of the carrier's failure to have "another man . . . assigned to ride with the hostler to keep a lookout from the fireman's side of the cab or from the rear of the tender" (R. p. 126).

4. The Circuit Court of Appeals was in error in ruling (R. p. 126) that the jury was warranted in finding under the first count negligent operation by the hostler by reason of the carrier's failure to assign "another man . . . to ride with the hostler to keep a lookout from the fireman's side

of the cab or from the rear of the tender," in view of the pleadings, which limit the negligence under the first count to negligence of the hostler and not to negligence of the petitioner.

5. The Circuit Court of Appeals was in error in its treatment of the case under the second count. It adopted a false standard of duty and applied a false test of liability, as set out in its opinion (R. p. 126) as follows:

> "The sufficiency of the evidence to support the verdict on the second count is at least equally clear. The defendant *might have painted lines on the platforms of its washstand* to indicate the extent to which locomotives overhang them, and thus to warn persons on the platforms of the danger incident to standing near their inner borders, or it *might even have set the platforms of its washstand back from the tracks far enough to prevent locomotives from overhanging them at all.*
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> "From the foregoing, it is clear that although some precautions were taken for the decedent's safety, *further precautions were possible.*" (Italics ours.)

6. The Circuit Court of Appeals was in error in ruling (R. p. 126) that the jury was warranted in finding under the second count that there was a breach of duty by the petitioner to the decedent by reason of its failure "to paint lines on the platforms of its washstand."

7. The Circuit Court of Appeals was in error in ruling (R. p. 126) that the jury was warranted in finding under the second count that there was a breach of duty by the petitioner to the decedent by reason of its failure to set "the platforms of its washstand back from the tracks far enough to prevent locomotives from overhanging them at all."

8. The Circuit Court of Appeals was in error in making the following ruling (R. p. 126):

> "Although some precautions were taken for the decedent's safety, further precautions were possible, and from this it follows, as we read the decisions cited above, that there is an 'evidentiary basis' for submitting the issue of the defendant's causal negligence to the jury, and hence our 'function is exhausted.'"

9. The Circuit Court of Appeals was in error in ruling (R. p. 127) that the defendant's 19th request for instruction was properly denied. The request is as follows:

> "19. The defendant owed no duty to have a lookout stationed on the rear of the tender as it was backing toward the washstand."

10. The Circuit Court of Appeals was in error in ruling (R. p. 127) that the defendant's 27th request for instruction was properly denied. The request is as follows:

> "27. The defendant owed no duty to blow a whistle, it would only add to the confusion."

11. The Circuit Court of Appeals was in error in affirming the judgment of the District Court.

Summary of the Argument.

I. The Circuit Court of Appeals was in error in ruling that the jury was warranted in finding that the petitioner was guilty of negligence under the first count of the complaint.

A. The statute under which this action is brought is not a workmen's compensation act, but the Federal Employers'

Liability Act, and there can be no recovery without proof of negligence.

B. The law regarding the duty of carriers is well settled.

1. The carrier is not an insurer of the safety of its employees.

2. The carrier's duty is to use reasonable or ordinary care.

3. The *mere happening* of an accident with the *possibility of prevention* is not the test of negligence.

4. The carrier is not bound to anticipate the negligence of an employee.

C. Tested by these well-settled principles, the evidence is insufficient to prove negligence in the operation of the locomotive as alleged in the first count of the complaint.

1. There was no negligence in the speed of the locomotive.

2. The hostler was not negligent in failing to see the decedent.

(*a*) The hostler could not see the decedent where he was voluntarily but needlessly standing too near the track on the southerly washstand where he had no duty to perform.

(*b*) The hostler had no reason to anticipate the presence of the decedent where he was standing but not working.

(*c*) The hostler was not negligent in failing to leave the throttle to go over to the fireman's side to see if there was anyone standing too near the track on the fireman's side.

3. The hostler was guilty of no breach of duty to the decedent with respect to giving proper warning. The bell was ringing.

4. The hostler was not negligent in failing to blow a whistle. There was no rule or custom to blow the whistle; and there were no circumstances requiring such warning.

5. The hostler was not negligent with reference to the searchlight on the rear of the tender. The searchlight was burning.

6. The hostler was not negligent in failing to stop the locomotive at the end of the washstand. The hostler had no duty to make such a stop either by rule, or by custom, or under the circumstances.

7. The *hostler* was guilty of no breach of duty to the decedent in failing to assign more men to ride with him in the cab.

(*a*) The exercise of reasonable care did not, in the absence of rule or custom, require more men in the cab than the hostler.

(*b*) Even if the *carrier* owed such a duty, that duty did not devolve on the *hostler*, who alone is charged in the first count of the complaint with negligence in the *operation* of the locomotive, and whose only breach of duty is alleged to have been that he failed "to see or to warn the said Frederic of the approach of said locomotive or to take any other means to avoid striking him."

8. The hostler was not negligent in backing the locomotive in the usual and customary manner, particularly in view of the fact that no accident had ever before happened from such operation, and that the hostler had no knowledge of the decedent's peril.

The Circuit Court of Appeals adopted a false standard of duty and applied a false test of liability. The *mere happening* of an accident coupled with the *possibility of prevention* is not the test of negligence. This theory of law makes the carrier an insurer of the safety of its employees and converts the Federal Employers' Liability Act into a system of workmen's compensation.

II. The Circuit Court of Appeals was in error in ruling that the jury was warranted in finding that the petitioner

was guilty of negligence under the second count of the complaint.

1. The second count alleges breach of duty of the petitioner in failing to furnish the decedent with a reasonably safe place to work and in failing to warn him of the unsafe condition existing.

2. The burden was on the respondent to prove that the petitioner failed to use reasonable or ordinary care to provide a reasonably safe place to work.

3. The petitioner was guilty of no breach of duty to the decedent with respect to his place of work.

(*a*) The measure of duty is *reasonable* or *ordinary care* to provide a *reasonably safe* place to work.

(*b*) It is not the duty of the carrier to *guarantee* or *insure* the safety of its employees by furnishing the safest possible place.

(*c*) The evidence is insufficient to warrant a finding that the respondent was negligent with regard to the layout of the yard, the construction and maintenance of its washstands, and the overhang of the locomotives.

(*d*) There was no negligence with respect to lighting conditions.

(*e*) The respondent owed the decedent no duty to make any changes in its premises or to make them safer than they were.

4. The carrier owed to the decedent no duty to give him warning of obvious risks not due to its negligence, especially in view of the fact that the decedent had knowledge of the existing conditions. There was no duty, therefore, to mark the platforms with a white line indicating the extent of the overhang of locomotives.

5. In stating in its opinion (R. p. 127) that the carrier "might have painted lines on the platforms of its washstand to indicate the extent to which locomotives overhang them, and thus to warn persons on the platforms of the

danger incident to standing near their inner borders, or it might even have set the platforms of its washstand back from the tracks far enough to prevent locomotives from overhanging them at all," the Circuit Court of Appeals adopted a false standard of duty and applied a false test of liability. This treatment of the case makes the carrier an insurer of the safety of its employees.

III. The Circuit Court of Appeals was in error in ruling that "there is an 'evidentiary basis' for submitting the issue of the defendant's causal negligence to the jury, and hence that our 'function is exhausted.' "

The cases cited by the Circuit Court of Appeals do not support its reasoning. In those cases the question involved was whether there was evidence to support certain inferences from facts in dispute. In the case at bar there is no question of possible inferences. The sole question here is whether, on the basis of undisputed facts, there was a breach of duty under the law.

IV. The Circuit Court of Appeals was in error in ruling that the petitioner's 19th and 27th requests for instructions were properly denied. The requested instructions bore on vital issues of negligence; they were applicable to the facts; and their denial was prejudicial error.

V. The Circuit Court of Appeals was in error in affirming the judgment of the District Court.

The verdict for the respondent was a general one, and the jury may have found its verdict on the first count or on the second count of the complaint, or it may have found for the respondent on some ground of negligence which should have been withdrawn from its consideration under the respondent's motion for a directed verdict on each count, or under the petitioner's requests for specific instructions. Under such circumstances it is well-settled law that the judgment should be reversed.

Argument.

I. The Circuit Court of Appeals was in error in ruling that the jury was warranted in finding that the petitioner was guilty of negligence under the first count of the complaint.

The argument on this branch of the case covers the specifications of errors numbered 1, 2, 3, and 4.

A. The statute under which this action is brought is not a workmen's compensation act but the Federal Employers' Liability Act (U.S.C. Title 45, c. 2, § 51), and there can be no recovery without proof of negligence which has a causal relation to the injury.

Tiller v. *Atlantic Coast Line R.R. Co.*, 318 U.S. 54, 67, 72.

Baltimore & Ohio R. Co. v. *Berry*, 286 U.S. 272, 276.

Atchison, Topeka & Santa Fe Ry. Co. v. *Toops*, 281 U.S. 351, 354-355.

McGivern v. *Northern Pacific Ry. Co.*, 132 F. (2d) 213, 216.

The common-law rules for determining negligence on the part of an employer towards his employee are controlling on the question as to what constitutes negligence within the meaning of the Federal Employers' Liability Act, unless by the terms of the Act common-law rules are abrogated. There is in this case no question of abrogation or qualification of the common-law rules of negligence.

McGivern v. *Northern Pacific Ry. Co.*, 132 F. (2d) 213, 217.

Bailey v. *Central Vermont Ry., Inc.*, 319 U.S. 350, 352.

It is elementary that there can be no negligence without a breach of duty.

Delaware &c. R.R. v. *Koske,* 279 U.S. 7, 11-12.
Atlantic Coast Line R.R. Co. v. *Davis,* 279 U.S. 34, 39.
Chicago &c. R.R. Co. v. *Kroloff,* 217 Fed. 525, 532.
Cruzan v. *New York Central &c. R.R. Co.,* 227 Mass. 594, 597.
Willey v. *Maine Central R.R. Co.,* 137 Me. 223, and cases cited.
Bedford &c. R.R. Co. v. *Brown,* 142 Ind. 659, 664.

B. Consideration of the applicable principles of law will be helpful to a proper appraisal of the evidence under the first count of the complaint.

1. It is well settled that a carrier is not an insurer of the safety of its employees.

Baltimore & Ohio &c. R.R. Co. v. *Carroll,* 280 U.S. 491, 496.
McGivern v. *Northern Pacific Ry. Co.,* 132 F. (2d) 213, 217.

2. The carrier's duty is to use *reasonable* or *ordinary* care for the protection of its employees.

Missouri Pacific R.R. Co. v. *Aeby,* 275 U.S. 426, 430.
Toledo &c. R.R. Co. v. *Allen,* 276 U.S. 165, 170.
McGivern v. *Northern Pacific Ry. Co.,* 132 F. (2d) 213, 217.

3. Accordingly it is well settled that the *possible prevention* of an accident *is not the test of negligence.*

> *Hewitt* v. *F. & P.M. R.R. Co.,* 67 Mich. 61, 72.
> *Leonard* v. *Collins,* 70 N.Y. 90, 94.
> *Augerstein* v. *Jones,* 139 Pa. 183, 187-188, 192.
> *Titus* v. *Bradford &c. R.R. Co.,* 136 Pa. 618, 626.

In *Hewitt* v. *F. & P.M. R.R. Co.,* 67 Mich. 61, the court said at page 72:

> "*The test of liability is not whether the company in this case omitted to do something it could have done, and which would have prevented the injury,* but whether it did anything or omitted to do anything, which under the circumstances, in the exercise of *ordinary care and prudence,* it ought to have done, and from which the injury to the plaintiff proceeded." (Italics ours.)

In *Augerstein* v. *Jones,* 139 Pa. 183, the court said at pages 187-188:

> "*This method of treatment makes the fact of the accident and its possible prevention the test of negligence of the defendant* which produces legal liability. It has been so many times decided, and by so many courts of last resort, that this is *not* the legal test of liability for negligence, especially where the plaintiff is an employee, and the action is against his employer, that it seems a work of supererogation to cite the authorities."

And at page 192 the court said:

> "Upon the whole case we are quite clear that *the court was in error in presenting to the jury an erroneous rule or test of liability.* . . ." (Italics ours.)

4. It follows that the carrier is not bound, *in the exercise of reasonable or ordinary care,* to anticipate the carelessness of its employee—

McGivern v. *Northern Pacific Ry. Co.,* 132 F. (2d) 213, 217;
Aerkfetz v. *Humphreys,* 145 U.S. 418, 420—

nor to protect him from the "usual risks" incident to employment on a railroad which cannot be eliminated through the exercise of reasonable care—

Tiller v. *Atlantic Coast Line R.R. Co.,* 318 U.S. 54, 72;
Anderson v. *Mo. Pacific R. Co.,* 95 Neb. 358, 364-365—

nor to warn its employee of obvious dangers not created by the carrier's negligence.

Kelley v. *New York Central R.R. Co.,* 255 Mass. 124, 127.
Coombs v. *Fitchburg R.R. Co.,* 156 Mass. 200, 201-202.
Walsh v. *Boston & Maine R.R.,* 284 Mass. 250, 252, and cases cited.
McCafferty v. *Lewando's French Dyeing &c. Co.,* 194 Mass. 412, 414.
Kelly v. *Boston Elevated Ry. Co.,* 214 Mass. 461, 462-463.
Atchison &c. Ry. Co. v. *Wyer,* 8 F. (2d) 30, 31.
McLean v. *Studebaker Bros. Co.,* 221 N.Y. 475, 479
Blacker v. *Oxford Paper Co.,* 127 Me. 228, 231.
Bancroft v. *Railroad,* 67 N.H. 466, 468.

C. Tested by these well-settled principles, the evidence is insufficient to prove negligence in the operation of the locomotive as alleged in the first count of the complaint.

1. The evidence does not warrant a finding that there was any negligence in the speed of the locomotive. It was backing slowly—2 to 4 miles an hour (R. pp. 52, 62)—and was coming to a stop (R. pp. 34, 53). In this connection the Circuit Court of Appeals said in its opinion (R. p. 125): "It is further conceded that the locomotive was moving slowly, in fact that it was coming to a stop, when it struck the decedent."

The foregoing evidence does not warrant a finding of negligent speed.

> *Toledo &c. R.R. Co.* v. *Allen,* 276 U.S. 165, 168.
> *Aerkfetz* v. *Humphreys,* 145 U.S. 418, 420.

2. The hostler was not negligent in failing to see the decedent.

(*a*) The hostler was unable to see the decedent. He testified (R. p. 53) that he did not at any time see the decedent. The undisputed facts (R. pp. 51, 52, 53, 61, 62, 64) are correctly stated by the Circuit Court of Appeals in its opinion (R. p. 125): "This locomotive was being operated at the time by a 'hostler' who was sitting in the engineer's seat on the right hand side of the cab at the controls. It is not disputed that from his seat the hostler could not see a person standing where the decedent must have been standing when struck because of the obstruction to his range of vision caused by the tender and the coal in it."

(*b*) The hostler had no reason to anticipate that the decedent or anybody else would be standing on the southerly washstand too near the track. There is no evidence that the hostler knew that somebody was likely to be "strip-

ping'' on the southerly washstand, for locomotives were not ''stripped'' until they stopped between the two washstands (R. pp. 33, 41, 72), and the undisputed evidence (R. pp. 52, 63) shows that the work of ''stripping'' locomotives was done on the right-hand side—the engineer's side of the engine—when locomotives were backed between the washstands. This would be on the northerly washstand (R. p. 63), and not on the southerly washstand where Meech was standing—not working—when he was struck (R. pp. 28, 34).

If there is any doubt about the question as to whether or not locomotives were ever stripped on the southerly washstand, which the petitioner denies, certainly that doubt cannot be helpful to the respondent, since the respondent has the burden of proving the negligence of Moquin, the hostler, in failing to look for Meech on the southerly washstand. And this burden the respondent fails to sustain unless she shows that the locomotives were in fact stripped on the southerly washstand and that therefore Moquin should have anticipated the presence of Meech at the place where he was at the time he was struck.

The hostler was not bound, in the exercise of ordinary care, to anticipate carelessness or negligence on the part of the decedent.

> *McGivern* v. *Northern Pacific Ry. Co.*, 132 F. (2d) 213, 217.
> *Aerkfetz* v. *Humphreys*, 145 U.S. 418, 420.

Moreover, there is no evidence that other employees might be around there, as suggested in the opinion of the Circuit Court of Appeals (R. p. 126). Ordinarily one man worked on those washstands stripping engines (R. pp. 64-65). The eight or ten men referred to (R. pp. 79-80) were *in the enginehouse* (R. p. 79), and the fact that some men

would be going back to work after lunch, at the time of this accident (R. p. 80), falls far short of being evidence that men used the washstands or crossed the washstands and the track between them for the purpose of going to lunch or returning to work. There was, therefore, no reasonable probability that the decedent or anyone else would be standing so near the edge of the southerly washstand—where there was no duty connected with "stripping" to be performed—that a backing engine would be likely to strike him.

(*c*) The hostler was guilty of no negligence in failing to leave the throttle to go over to the fireman's side of the locomotive to see if there was anyone standing near the track on that side. Such conduct on his part not only would have been a departure from custom, but would have been the exercise of extraordinary care, and not ordinary or reasonable care, particularly in view of the fact that the hostler had no reason to anticipate that the decedent would be standing, not only on the wrong side of the locomotive, but also on the wrong washstand (R. pp. 52, 63), and too near the track. Nor is there any evidence to show that, if the hostler had gone from side to side of the cab to look for careless employees standing too near the track, he would have seen the decedent.

Casey v. *Boston & Maine R.R.*, 231 Mass. 529, 533.

Braley v. *Grand Trunk R.R. Co.*, 185 Mich. 606, 619.

The record is bare of any evidence to show that the decedent was near the track more than a few seconds before he was struck. In fact, Kurtyka testified (R. p. 27) that he saw Meech a matter of seconds before the accident. There

is no other evidence to show how long Meech had been in his position of peril near the track.

3. The hostler was guilty of no breach of duty to warn the decedent by ringing a bell.

The respondent has failed to sustain the burden of proving that warning was not given by ringing a bell as required by a rule of the carrier (R. p. 58). The net result of the evidence on this point (R. pp. 31, 33, 54-57, 59, 81-83, 85-86) is correctly stated in the opinion of the Circuit Court of Appeals (R. p. 125) as follows: "Since there is direct evidence from the hostler and from some other workmen in the vicinity that the bell on the locomotive was ringing while it was being backed into the washstand, we may assume this to be the fact in spite of the testimony of another workman who said that he did not remember whether its bell was then ringing or not."

4. The hostler was not negligent in failing to blow the whistle, since he owed the decedent no duty to warn him by blowing a whistle.

In the first place, there was no rule or custom requiring the hostler to give warning by blowing a whistle when making a movement of this kind in the customary manner (R. p. 62); and, in the second place, the hostler had no knowledge that the decedent was in a position of peril and oblivious of the danger, which would require him to deviate from the customary manner of backing the locomotive or to take other steps than he did to protect the decedent.

The authorities are clear to the effect that, in the absence of rule or custom requiring it, no warning by whistle need be given, where, as here, the hostler had no knowledge of the decedent's peril.

Chesapeake & Ohio R.R. Co. v. *Mihas,* 280 U.S. 102, 108.

Toledo &c. R.R. Co. v. *Allen,* 276 U.S. 165, 173.
Sumney v. *Southern Ry. Co.,* 89 F. (2d) 437, 439.
Lenz v. *Union Pacific R.R. Co.,* 128 Neb. 99, 102.

In *Chesapeake & Ohio R.R. Co.* v. *Mihas,* 280 U.S. 102, the court said at page 108:

> "There is nothing in the record to show that employees engaged in the switching operation knew or had reason to believe that Mihas was in any position of danger. In the absence of such knowledge or ground for belief, they were not required to warn him of the impending switching operation or take other steps to protect him."

In *Toledo &c. R.R. Co.* v. *Allen,* 276 U.S. 165, the court said at page 173:

> "In the absence of knowledge on their part that he was in a place where he was liable to be struck and oblivious of that danger, they were not required to vary the switching practice customarily followed in that yard or to warn or to take other steps to protect him. There is no evidence to sustain the allegation that the other employees saw, or negligently failed to discover, plaintiff in a 'position of peril and oblivious thereof.' There was no foundation for a finding in favor of the plaintiff on that issue."

In *Sumney* v. *Southern Ry. Co.,* 89 F. (2d) 437, the court said at page 439:

> "The authorities are clear to the effect that, *in the absence of rule or custom requiring it,* no signal as to movement of cars need be given in the course of switching operations where, as here, there is nothing to show that those in charge of the operations know or have

reason to believe that others are in positions where they will be endangered thereby." (Italics ours.)

In *Lenz* v. *Union Pacific R.R. Co.*, 128 Neb. 99, the court said at page 102:

> "Likewise, under the decisions of the United States Supreme Court, it was not incumbent upon the members of the train crew to give warning, by *whistle* or by ringing a bell, to employees of the approaching train under the circumstances disclosed by the record. The train crew were not negligent in failing to keep a lookout for employees going upon the main line track. According to the record, they could have no knowledge of the plaintiff's intention or of his danger until the instant of the accident. Negligence in that respect is not disclosed."

The case at bar in this aspect is governed by the following decisions:

Aerkfetz v. *Humphreys,* 145 U.S. 418, 420.
Toledo &c. R.R. Co. v. *Allen,* 276 U.S. 165, 171.
Sumney v. *Southern Ry. Co.,* 89 F. (2d) 437, 439.
Hoffman v. *Chicago & N.W. R.R. Co.,* 91 Neb. 783.
Ryan v. *Northern Pacific R. Co.,* 53 Wash. 279, 283.

In *Aerkfetz* v. *Humphreys,* 145 U.S. 418, the court said at page 420:

> "There could have been no thought or expectation on the part of the engineer, or of any other employé, that he, thus at work in a place of danger, would pay no attention to his own safety. Under such circumstances, what negligence can be attributed to the

parties in control of the train or the management of the yard? They could not have moved the cars at any slower rate of speed. They were not bound to assume that any employé, familiar with the manner of doing business, would be wholly indifferent to the going and coming of the cars. There were no strangers whose presence was to be guarded against. The ringing of bells and the *sounding of whistles* on trains going and coming, and switch engines moving forwards and backwards, would have simply tended to confusion. The person in direct charge had a right to act on the belief that the various employés in the yard, familiar with the continuously recurring movement of the cars, would take reasonable precaution against their approach. The engine was moving slowly, so slowly that any ordinary attention on the part of the plaintiff to that which he knew was a part of the constant business of the yard would have made him aware of the approach of the cars, and enabled him to step one side as they moved along the track." (Italics ours.)

The case of *Aerkfetz* v. *Humphreys,* 145 U.S. 418, has been cited with approval, not only by the Federal courts—

Toledo &c. R.R. Co. v. *Allen,* 276 U.S. 165, 171;
Sumney v. *Southern Ry. Co.,* 89 F. (2d) 437, 439, and other cases—

but by every state court of last resort which has had occasion to consider the question. Some of the decisions of the state courts are the following:

Nadeau v. *Trustees of N.Y., N.H. & H. R.R.,* 310 Mass. 717, 720.
Cruzan v. *New York Central &c. R.R. Co.,* 227 Mass. 594, 597.

Weireter v. *Great Northern Ry. Co.*, 146 Minn. 350, 353.
Lenz v. *Union Pacific R. Co.*, 128 Neb. 99, 102.
Anderson v. *Mo. Pacific R. Co.*, 95 Neb. 358, 364-365.
Hoffman v. *Chicago &c. R. Co.*, 91 Neb. 783.
Hines, Dir. Gen., v. *Pershin*, 89 Okla. 297.
Carlo v. *Bessemer & Lake Erie R. Co.*, 293 Pa. 343.
Curtis v. *Erie R. Co.*, 267 Pa. 227, 231.

Accordingly the petitioner requested the judge of the District Court to instruct the jury as follows:

"27. The defendant owed no duty to blow a whistle, it would only add to the confusion" (R. p. 118).

This request was denied by the trial court, subject to the petitioner's exception (R. p. 110). And the Circuit Court of Appeals was in error in ruling (R. p. 127) that this request for instruction was properly denied by the District Court. This error will be discussed later in this brief.

5. The hostler was not negligent with reference to the searchlight on the rear of the tender.

In this connection the undisputed evidence is correctly summarized by the Circuit Court of Appeals as follows (R. p. 126): "It is further conceded . . . that a searchlight on the rear of the tender was burning."

6. The hostler was not negligent in failing to stop the locomotive at the end of the washstand, as argued by respondent's counsel (R. pp. 96, 97). The hostler did not know and had no reason to believe that Meech was in a position of peril standing too near the edge of the southerly

washstand on which he had no duty to perform. The hostler had a right to believe that Meech would keep out of the way of the backing locomotive.

> *Toledo &c. R.R. Co.* v. *Allen,* 276 U.S. 165, 171.
> *Aerkfetz* v. *Humphreys,* 145 U.S. 418, 420.

And the hostler was not bound to anticipate the negligence or carelessness of the decedent, particularly in view of the safety rules (R. p. 81), a copy of which Meech had (R. p. 81). He had a right to assume that every employee would obey the safety rules for his own protection.

In this connection the court instructed the jury (R. p. 109): "When Mr. Meech agreed to obey the rules of the railroad, he was bound as a matter of contract to obey them. And you may take into account, if he broke the rules, that his breach of the rules would be some evidence of negligence."

In *McGivern* v. *Northern Pacific Ry. Co.,* 132 F. (2d) 213, the court said at page 217:

> "Neither is it actionable negligence that an employer fails to anticipate carelessness or lack of care on the part of his employee."

Moreover, the locomotive was backing very slowly at the end of the washstand. It was just coming to a stop, according to the respondent's witness Moquin, the hostler (R. p. 53), and the respondent's witness Kurtyka testified (R. p. 34) that it was stopping.

Respondent's counsel argued (R. p. 96) that the hostler was negligent in failing to stop the locomotive at the end of the washstand for the reason that "he knew that there were men passing back and forth there, and at various hours getting their lunch, he knew there was a reasonable proba-

bility that there would be a person or persons on one or two of those stands, and persons crossing those tracks."

This contention is not supported by any evidence. The only evidence bearing on this point is to be found in the testimony of Fournier (R. pp. 79-80), which is as follows:

> "X-Q 152. And how many men were working there nights, about the time of the accident?
>
> "A. Let's see. About eight or ten.
>
> "X-Q. 153. Eight or ten men around the enginehouse, the equipment building, and the spider?
>
> "A. There wasn't eight or ten men out in the equipment building.
>
> "X-Q. 154. Where were the eight or ten men?
>
> "A. In the enginehouse.
>
> "X-Q. 155. They would also have their lunch at from 1 o'clock to 2, at various times?
>
> "A. They had their lunch around that. One o'clock.
>
> "X-Q. 156. What time did this accident happen?
>
> "A. I should say about 1.40, 1.45.
>
> "X-Q. 157. That would be during the period when some of the men were having their lunch, going back and forth?
>
> "A. Some would be going back to work."

This falls far short of being evidence that men used the washstands or crossed the washstands and the track between them for the purpose of going to lunch or returning to work, since the witness testified (R. p. 79) that the eight or ten men referred to in his testimony were *in the enginehouse*. Moreover, there was no "reasonable probability" that Meech or anyone else would be standing on the southerly washstand near the rail, since, as previously argued, the stripping was all done from the northerly washstand

(R. pp. 52, 63). If Meech had been standing on the northerly washstand, where it was his duty to be in stripping engines, where "his presence would normally be anticipated and where he would be in the hostler's range of vision from the engineer's seat" (Opinion, R. pp. 126-127), there would have been no accident.

7. The *hostler* was not negligent in operating the locomotive on the ground, as stated by the Circuit Court of Appeals in its opinion (R. p. 126), that "another man could have been assigned to ride with the hostler to keep a lookout from the fireman's side of the cab or from the rear of the tender for workmen in the vicinity of the engine house, who might be presumed to be busy and hence inattentive at times to their own safety."

(*a*) The exercise of ordinary or reasonable care did not, in the absence of a rule or custom, require the carrier to have more men in the cab than the hostler.

There is nothing in the record to show that in this respect the locomotive was not being operated in the usual and ordinary way. Moquin, the respondent's own witness, who had been a hostler for twenty-six years (R. p. 49), testified (R. p. 51) that he was alone in the cab; that nobody else was with him; that *ordinarily* there was just one man in the cab doing hostler work (R. p. 52); that nobody was on the fireman's side; that that was the *customary* way of handling locomotives which were being backed up to the washstands to be stripped of equipment (R. pp. 61-62); that *it was not customary to have anybody besides the hostler in the locomotive* which was being backed down to have this work done (R. p. 62). No violation, therefore, of any rule or custom in the operation of the locomotive is shown, and there is no evidence that operation of a locomo-

tive in this manner had ever before resulted in injuring an employee.

There was no duty to have more men in the locomotive to act as lookouts for persons standing too near the track. Nor was there any breach of duty in failing to have a lookout stationed on the rear of the tender or to have someone walking on the track in front of the tender to warn the intestate of the danger of being struck if he stood too near the track. The petitioner was not bound to assume that an employee would be wholly indifferent to the going and coming of cars.

In this aspect, therefore, the case at bar is governed by the following decisions:

Aerkfetz v. *Humphreys,* 145 U.S. 418, 420.
Marshall v. *Hines,* 271 Fed. 165, 168.
Chicago &c. R.R. Co. v. *Kroloff,* 217 Fed. 525, 532.
Hines, Dir. Gen., v. *Pershin,* 89 Okla. 297 (citing with approval *Aerkfetz* v. *Humphreys,* 145 U.S. 418, 420).
Kemp v. *Del., L. & W. R. Co.,* 99 N.J.L. 238, 242 (cert. den. 264 U.S. 583).
Louisville & Nashville R.R. Co. v. *Stidham, Admr.,* 187 Ky. 139, 143.
Merkouras v. *Chicago &c. R. Co.,* 101 Neb. 717, 721-722.

In the case of *Aerkfetz* v. *Humphreys,* 145 U.S. 418, to which the court's attention has already been called in this brief, the court said at page 420:

> "It cannot be that, under these circumstances, the defendants were compelled to send some man in front of the cars for the mere sake of giving notice to em-

ployés who had all the time knowledge of what was to be expected."

In *Chicago &c. R.R. Co.* v. *Kroloff,* 217 Fed. 525, the court said at page 532:

> "The bell was rung; the headlight was burning. This watchfulness and these warnings constituted the exercise of ordinary care, and there was no substantial evidence that failure to keep a man on the footboard of the approaching engine to look out for pedestrians, to warn them, to signal the engineer of their presence, or to stop the engine, constituted any failure of that degree of care, and for that reason these charges should have been withdrawn from the jury."

In *Hines, Dir. Gen.,* v. *Pershin,* 89 Okla. 297, the court said:

> "Employees of a railroad company are presumed to contract with reference to the hazards incident to the service. *It is not the duty of such a company to place an employee on the lookout* to warn others of approaching danger. It is their [employees'] duty, without warning, to observe due care, and this is a part of their undertaking, and any omission is at their peril." (Italics ours.)

In *Louisville & Nashville R.R. Co.* v. *Stidham, Admr.,* 187 Ky. 139, the court said at page 143:

> "That under such circumstances a railroad company in backing an engine over its tracks must not only maintain a lookout but to make it effective must place a man on the front end of the tender is to us a novel contention and one wholly unsupported by any authority so far as we know."

Accordingly the petitioner requested the judge of the District Court to instruct the jury as follows:

> "19. The defendant owed no duty to have a lookout stationed on the rear end of the tender as it was backing toward the washstand" (R. p. 118).

This request was denied by the trial court, subject to the petitioner's exception (R. p. 110). And the Circuit Court of Appeals was in error in ruling (R. p. 127) that this request for instruction was properly denied by the District Court. This error will be discussed later in this brief.

Cases like *Gregory* v. *Maine Central R.R. Co.*, 317 Mass. 636, 638, and *New York Central R.R. Co.* v. *Marcone*, 281 U.S. 345, 349, relied on by the respondent, are clearly distinguishable from the case at bar.

In *Gregory* v. *Maine Central R.R. Co.*, 317 Mass. 636, there was evidence that "*Several hundred workmen* were working in the building, and had been for a week or more. . . . Many workmen of various trades were constantly working on the floor of the building, in the neighborhood of the spur track, and *often had occasion to work within the rails of that track or to cross it.*" There was also evidence that "Whenever a train entered the building there would be a man walking in front of or by the side of the train."

In the case at bar there is no evidence that there was any such working condition as in the *Gregory* case, nor any evidence of a *custom* to have "*a man walking in front of or by the side of the train,*" whenever a train was backed to be stripped. On the contrary, the undisputed evidence of the plaintiff's own witness shows that the locomotive was being operated in the customary way (R. pp. 61, 62); that *it was not customary* to have anybody besides the hostler in the locomotive which was being backed down to have this work done (R. p. 62).

Likewise, in *New York Central R.R. Co.* v. *Marcone,* 281 U.S. 345, 349, there was evidence of a *custom,* violation of which was evidence of negligence.

It follows, therefore, that, in order to show any negligence of the hostler for failure "to take any other means to avoid striking him" (Complaint, R. p. 3), the respondent must show violation either of a rule or custom, or circumstances requiring more precautions than the hostler did take. This the respondent has failed to do. Moreover, there is no evidence that any accident had ever before occurred at either of these washstands when locomotives were backed for stripping in the customary manner. It cannot, therefore, now be fairly contended that *other precautions, which had never before been taken and which were not required in the exercise of ordinary care, should have been taken at the time of the accident.* The hostler's evidence (R. p. 52) that there was no one on the rear of the tender, and that he did not blow any whistle (R. p. 55), is no evidence of negligence, since, as previously argued, there was no duty to blow a whistle or to have a lookout on the locomotive.

(*b*) But even if the *carrier* owed to the decedent the duty to have more men in the locomotive to act as lookouts, its failure to perform that duty would not constitute negligence of the *hostler in operating the locomotive.*

The first count of the complaint (R. pp. 2-3) alleges that the decedent was "struck, run over and killed by the said locomotive which was being then and there *negligently operated by an employee* or employees of the defendant in that, among other things, they failed to see or to warn the said Frederic of the approach of said locomotive or to take any other means to avoid striking him." This count

not only limits the breach of duty to negligent operation of the locomotive by an *employee* or employees of the carrier, but further limits the charge of negligence of the *operating employee* to failure *"to see or to warn the decedent."* It follows that, even if the carrier owed the decedent any such duty, as assumed by the Circuit Court of Appeals (Opinion, R. p. 126), the question of the breach of such duty would be *irrelevant under the pleadings.*

Nowhere in the first count is there any allegation of a breach of duty by the *carrier* in failing to assign more men to ride in the locomotive to act as lookouts. It was certainly no part of the duty of the *hostler* to assign men to ride in the locomotive, and he was, therefore, guilty of no breach of duty in this respect in operating the locomotive. He was operating it in the customary way (R. pp. 61-62).

It is well settled that declarations or complaints control the issues to be determined.

> *Santa Fe &c. Ry. Co.* v. *Hurley,* 4 Ariz. 258, 262-263 (affirmed, 172 U.S. 645).
> *Warner* v. *Synnes,* 114 Ore. 452.

In *Santa Fe &c. Ry. Co.* v. *Hurley,* 4 Ariz. 258 (affirmed, 172 U.S. 645), the court said at pages 262-263:

> "We are not unmindful of the broad and comprehensive liberality of our system of code pleading, but that system was never designed to enable a party to raise issues for the first time by the evidence, or to recover upon an issue other than the one stated in the pleading."

It is also well settled that a plaintiff must be held to the particular grounds of negligence specified.

> *Utess* v. *Erie R.R. Co.,* 212 N.Y. 138, 142.

Beave v. *St. Louis Transit Co.*, 212 Mo. 331, 352, 353.
Chicago &c. R. Co. v. *Driscoll*, 176 Ill. 330, 336.
So. Ry. Co. v. *Elliott*, 170 Ind. 273, 281.
Chicago &c. R. Co. v. *Wheeler*, 70 Kan. 755.

In *Utess* v. *Erie R.R. Co.*, 212 N.Y. 138, the court said at page 142:

> "The plaintiff must be held to the particular grounds of negligence specified."

In *Chicago &c. R. Co.* v. *Driscoll*, 176 Ill. 330, the court said at page 336:

> "The rule is fundamental that a plaintiff must recover, if at all, upon the case made by his declaration, and in the application of this rule to actions for negligence, plaintiff cannot allege a specific act of negligence and recover upon proof of negligence of a different character."

8. While the evidence in the case at bar establishes the fact, as conceded by the Circuit Court of Appeals (R. p. 126), that "the locomotive was being operated in the way usual and customary," and while the evidence further shows that no employee had ever before been injured by such operation, the Circuit Court of Appeals reached an erroneous conclusion under the first count for two reasons: In the first place, the Circuit Court of Appeals adopted a false standard of duty and test of liability; and in the second place, it ignored the limitation of the issue under the first count, which specifies the negligence as *negligence of the hostler in the operation of the locomotive in failing to see or to warn the decedent* (R. pp. 2-3).

The possibility of preventing the accident by exercising the care suggested is not the test of liability. The test of negligence under the first count is not whether the locomotive "could have been operated more carefully" (R. p. 126), but whether the evidence shows that the *hostler* failed to exercise *ordinary or reasonable care* in operating the locomotive as he did.

In its opinion the Circuit Court of Appeals suggests (R. p. 126) that "another man could have been assigned to ride with the hostler to keep a lookout;" or "the whistle on the locomotive could have been sounded;" but, as already argued, the hostler was guilty of no breach of duty to the decedent in the two respects mentioned, or in any other respect.

The measure of duty suggested by the Circuit Court of Appeals would require the carrier to exercise not *ordinary* or *reasonable* care, but *extraordinary* care. It would, in effect, make the carrier an insurer of the safety of the decedent. And it is respectfully submitted that the Circuit Court of Appeals has by an act of judicial legislation converted the Federal Employers' Liability Act into a workmen's compensation act.

Under all the circumstances the respondent has failed to show any breach of duty to the decedent under the first count. The bell was ringing (R. pp. 56, 83), the searchlight on the rear of the tender was burning (R. pp. 59, 30, 83); the locomotive was being backed very slowly—2 to 4 miles an hour (R. pp. 52, 53, 62), coming to a stop (R. pp. 34, 53), in an area that was brightly illuminated by stationary electric lights (R. pp. 13-14, 35, 43, 45, 60, 71, 73-74, 86-91, Opinion, p. 125). The hostler did not and could not see the decedent (R. pp. 53, 52, 62), and had no reason to anticipate his presence on the edge of the southerly platform, where he had no duty to perform, with his back to-

ward the approaching locomotive (R. pp. 34, 37), instead of on "the northerly platform upon which his presence would normally be anticipated and where he would be in the hostler's range of vision from the engineer's seat" (Opinion, R. pp. 126-127). The *hostler,* under the pleadings, could not be negligent in failing to have more men in the cab, even if the *carrier* owed such a duty to the decedent —which it did not. Moreover, the locomotive was being backed in the usual and customary manner; and the evidence fails to show that any employee had ever before been injured by a locomotive as the result of this movement which was being made in the customary manner. Under the first count, therefore, the case should have been withdrawn from the jury.

II. The Circuit Court of Appeals was in error in ruling (R. p. 126) that the jury was warranted in finding that the petitioner was guilty of negligence under the second count of the complaint.

The argument on this branch of the case covers the specifications of errors numbered 5, 6, and 7.

The general principles of law set out in sections "A" and "B" of Part I of this brief (pages 20 to 23) are applicable also to the second count of the complaint.

1. The second count, added by amendment (R. pp. 5-6), alleges in substance that the defendant failed to furnish the intestate with a reasonably safe place to work, in that parts of passing locomotives overhung the platform and did strike persons and objects thereon; and that the decedent had no knowledge of and was not warned of the unsafe and dangerous condition existing.

There is no evidence that any person standing on either washstand had ever before been struck by a backing

locomotive, and the only evidence that any object had ever been struck is to be found in the testimony of Kurtyka (R. p. 32), who said that once he had seen some lanterns on the southerly washstand knocked over; that they would be knocked over if they were standing on the edge of the platform and had not been put where they belonged; that when they were not put in the proper place they might be struck by the overhang of the locomotives (R. p. 33).

The fact that Kurtyka once saw some lanterns on the southerly washstand knocked over by the overhang of a locomotive is not evidence that locomotives were ever stripped on the southerly washstand.

2. The burden was on the plaintiff to prove that the defendant failed to use *ordinary or reasonable* care to provide a reasonably safe place for the decedent to work in, since proof of negligence of the railroad is prerequisite to recovery under the Federal Employers' Liability Act.

Tennant v. *Peoria &c. Ry. Co.*, 321 U.S. 29, 32.
Baltimore & Ohio R. Co. v. *Berry*, 286 U.S. 272, 276.
Pennsylvania R.R. Co. v. *Chamberlain*, 288 U.S. 333, 343.
St. Louis &c. Ry. Co. v. *Mills*, 271 U.S. 344, 347.
Chicago, Milwaukee & St. Paul Ry. Co. v. *Coogan*, 271 U.S. 472, 478.
Looney v. *Metropolitan R.R. Co.*, 200 U.S. 480, 487-488.
Patton v. *Texas & Pacific Ry. Co.*, 179 U.S. 658, 663.
Reading Co. v. *Boyer*, 6 F. (2d) 185, 186.
Payne v. *Bucher*, 270 Fed. 38, 40.
Lynch v. *New York, New Haven & Hartford R.R. Co.*, 294 Mass. 152, 161.

3. The petitioner was guilty of no breach of duty to the decedent with respect to his place of work.

(*a*) The measure of duty is that the employer shall exercise *reasonable or ordinary care to provide a reasonably safe place of work* for his employees.

Baltimore & Ohio &c. R.R. Co. v. *Carroll,* 280 U.S. 491, 496.
Seaboard Air Line Ry. v. *Horton,* 233 U.S. 492, 502.
Yazoo &c. R.R. Co. v. *Mullins,* 249 U.S. 531, 533.
McGivern v. *Northern Pacific Ry. Co.,* 132 F. (2d) 213, 217.

(*b*) It is not the duty of the carrier to *guarantee* or *insure* the safety of its employees against injury by furnishing the safest possible place to work.

McGivern v. *Northern Pacific Ry. Co.,* 132 F. (2d) 213, 217.
Bedford &c. R.R. Co. v. *Brown,* 142 Ind. 659, 665.
Blacker v. *Oxford Paper Co.,* 127 Me. 228.

In *McGivern* v. *Northern Pacific Ry. Co.,* 132 F. (2d) 213, the court said at page 217:

> "The employer is not, however, the *insurer* of the safety of his employee, and the test is whether *reasonable or ordinary care* has been exercised by the employer in that regard. . . . It cannot be said that the situation did not present dangers, but danger in a particular phase of an employment does not necessarily imply negligence. As said by the Supreme Court in *Mo. Pac. R. Co.* v. *Aeby,* 275 U.S. 426, 'no employment is free from danger.'" (Italics ours.)

In *Bedford &c. R.R. Co.* v. *Brown,* 142 Ind. 659, the court said at page 665:

> "It is the general rule that it is the duty of the master to supply safe places and appliances for the service of his employees, but *it is not understood that this duty requires the master* to make a powder house a place of safety or *to make railroading as free from danger as hoeing corn . . .*" (Italics ours.)

In *Blacker* v. *Oxford Paper Co.,* 127 Me. 228, the court said at page 230:

> "The relation of master and servant does not impose on the master the obligation to *guarantee* that the servant will never sustain any injury in discharging the duties of his employment."

(*c*) The railroad yard at East Deerfield has various tracks (Plan, Exhibit 1, R. p. 113). *There is only one track upon which locomotives were backed for stripping, and upon which locomotive 2719 was backed* (R. pp. 59, 72). This track runs substantially east and west, between two washstands (R. pp. 12, 36, 59, 72), and runs onto the turntable at the easterly end, and to the west divides into two tracks (R. p. 12). These two ash tracks lead to some ash pits, which are west of the waterplugs or water towers, and beyond the westerly edge of the plan (R. pp. 17-18). The distance from the waterplug, where Moquin, the hostler, took control of the locomotive (R. p. 59), to the westerly end of the washstand is 213 feet, measured along the southerly track (R. pp. 13, 65). The lower or southerly washstand, the one on which Meech was standing (R. pp. 27, 29), is 97 feet long and 6 feet wide (R. p. 12), and the northerly washstand is 98 feet long and 6 feet wide (R. p. 12). The washstands are made of 6-foot plank-

ing placed at right angles to the track (R. p. 15). The distance between the rails is 4 feet 8½ inches, and the space between the edge of the washstand and the nearer rail on each side is 1.6 feet (R. p. 12). Locomotive 2719 would overhang from the rail 2 feet 8 inches (R. p. 16), and therefore would overhang the platform 1.2 feet (R. p. 16). The distance from the southerly side of the southerly washstand to the nearer rail of the track south of the washstand is a little over 4 feet at the easterly end of the washstand and a little over 6 feet at the westerly end of the stand (R. p. 13). There was, therefore, no overhang on the southerly washstand from any locomotives or trains on the track south of the southerly washstand, which is the track upon which the "Springfield job" (R. p. 37) was going toward the turntable (R. pp. 37, 58).

On the foregoing undisputed facts, the evidence is insufficient to warrant a finding that the respondent was negligent with regard to the layout of the yard, the construction and maintenance of the washstands, and the overhang of locomotives.

Missouri Pacific R.R. Co. v. *Aeby,* 275 U.S. 426, 430.

Baltimore & Ohio R.R. Co. v. *Groeger,* 266 U.S. 521, 530-531.

Toledo &c. R.R. Co. v. *Allen,* 276 U.S. 165, 170.

Chicago &c. R.R. Co. v. *Driscoll,* 176 Ill. 330, 334.

Sullivan v. *Chicago &c. R.R. Co.,* 128 Neb. 92, 95-96.

Coombs v. *Fitchburg R.R. Co.,* 156 Mass. 200, 201-202.

Kempton v. *Boston El. Ry.,* 217 Mass. 124, 127.

Morris v. *Pryor,* 272 Mo. 350.

Lenz v. *Union Pacific R. Co.,* 128 Neb. 99.

Stone v. *Chicago &c. R. Co.,* 176 Minn. 104.

In *Missouri Pacific R.R. Co.* v. *Aeby,* 275 U.S. 426, the court said at page 430:

> "The petitioner was not required to have any particular type or kind of platform or to maintain it in the safest and best possible condition."

In *Baltimore & Ohio R.R. Co.* v. *Groeger,* 266 U.S. 521, the court said at pages 530-531:

> "Comparative merits as to safety or utility are most difficult to determine. It is not for the courts to lay down rules which will operate to restrict the carriers in their choice of mechanical means by which their locomotives, boilers, engine tenders and appurtenances are to be kept in proper condition. *Nor are such matters to be left to the varying and uncertain opinions and verdicts of juries.*" (Italics ours.)

In *Toledo &c. R.R. Co.* v. *Allen,* 276 U.S. 165, the court said at page 170:

> "Carriers, like other employers, have much freedom of choice in providing facilities and places for the use of their employees. *Courts will not prescribe the space to be maintained between tracks in switching yards, nor leave such engineering questions to the uncertain and varying opinions of juries.*" (Italics ours.)

In *Sullivan* v. *Chicago &c. R.R. Co.,* 128 Neb. 92, the court said at pages 95-96:

> "Construction of a particular type of platform, or maintaining it in the safest possible condition, is not required. The measure of duty to employees is *reasonable care,* having regard to the circumstances." (Italics ours.)

In *Coombs* v. *Fitchburg R.R. Co.*, 156 Mass. 200, the court said at pages 201-202:

> "If any importance is to be attached to *the overhang of the cars,* he certainly knew as much about that as any one." (Italics ours.)

In *Kempton* v. *Boston Elevated Ry.*, 217 Mass. 124, the court said at page 127:

> "As has been stated, *the defendant owed to the intestate no duty to change its construction,* the location of its post, or the width of its cars." (Italics ours.)

In *Morris* v. *Pryor,* 272 Mo. 350, the court said:

> "Construction is not required to be *absolutely safe even for a careless employee.*" (Italics ours.)

In the case at bar, Meech was a machinist's helper who had been employed at the East Deerfield enginehouse for over two months (R. pp. 21, 68). On the night in question he had worked on the northerly washstand from 11 p.m. stripping engines until he was struck (R. p. 68), about 1.45 a.m. the next morning (R. p. 43). He knew, both as a machinist's helper working on locomotives and from his work around the yard, that every locomotive tender has an overhang. And he knew, or should have known, that the tender overhung the washstand, although he may not have known the exact extent of the overhang. It was perfectly obvious from the distance between the washstands and the nearest rail (see Plan, Exhibit 1, R. p. 113, and Exhibits A, B, C, R. p. 62) that the tender would overhang the washstand, and that, if he stood too near the edge of the washstand, he would be struck.

In this connection the respondent's witness Kurtyka testified (R. p. 32) that an engine would knock over the oil

cans and lanterns if they were not put where they belonged; that it would knock them over if they were standing on the edge of the platform. On cross-examination the witness testified (R. p. 33) that when oil cans and lanterns were not put in the proper place they were struck by the overhang of the locomotives; that, if the oil cans and lanterns were put too near the edge, a locomotive going by might hit them and knock them down (R. p. 33); that he had seen that happen only once (R. p. 32).

There is no evidence that any workman on either washstand had ever before been struck by the overhang of a locomotive.

(*d*) There is no allegation in the second count that the place was unsafe because of inadequate lighting, nor was such contention made by respondent's counsel in his argument to the jury. The evidence would not have supported such a contention. The effect of the undisputed evidence is stated in the opinion of the Circuit Court of Appeals (R. p. 125): "The washstand was brightly illuminated by stationary electric lights in the vicinity."

(*e*) The petitioner owed the decedent no duty to make any changes in its premises or to make them safer than they were.

Kelley v. *New York Central R.R. Co.*, 255 Mass. 124, 127.

Coombs v. *Fitchburg R.R. Co.*, 156 Mass. 200, 202.

Sylvain v. *Boston & Maine R.R.*, 280 Mass. 503, 505.

Kempton v. *Boston El. Ry.*, 217 Mass. 124, 127.

Sweeney v. *Berlin & Jones Env. Co.*, 101 N.Y. 520, 524.

In *Kelley* v. *New York Central R.R. Co.*, 255 Mass. 124, the court said at page 127:

> "The employer owes no duty to call attention to dangers which are apparent to the senses of an ordinarily intelligent person; or, assuming that conditions are obvious, to make improvements or changes which will make the place of labor *safer* or *different than it manifestly is.*" (Italics ours.)

In *Coombs* v. *Fitchburg R.R. Co.*, 156 Mass. 200, the court said at page 202:

> "But he assumed the risks that were obvious and incident to his employment with the tracks and switches located as they were, and *cannot now say that they might have been made safer.*" (Italics ours.)

In *Sylvain* v. *Boston & Maine R.R.*, 280 Mass. 503, the court said at page 505:

> "The master owes the servant no duty to change the obvious conditions and methods of business in use when the employment began, even though they are less safe than others, and so cannot be charged with negligence in continuing them."

In *Sweeney* v. *Berlin & Jones Env. Co.*, 101 N.Y. 520, the court said at page 524:

> "In the absence of defective construction, or of negligence or want of care in the repairing of machinery furnished by him, the master incurs no liability for injuries arising from its use. The general rule is that the servant accepts the service, subject to the risks incidental to it, and where machinery and implements are at that time of a certain kind or condition,

and the servant knows it, *he can make no claim upon the master to furnish other or different safeguards.*" (Italics ours.)

There is no evidence that in the exercise of *reasonable* care the petitioner should have made any changes.

There is no evidence that the washstands were not properly designed and constructed for the purposes for which they were intended. They had been in use for many years. The respondent's witness Aiston testified (R. p. 41) that the same washstands had been used quite a few years, he should say 17 or 18, and the condition of the premises during that time was the same as at the time of the accident. The petitioner's witness Fournier, a relief foreman (R. p. 75), testified (R. p. 72) that the practice of stripping and equipping locomotives on that track between the northerly and southerly washstands had been going on between 23 and 24 years that he knew of; and the washstand had been in the same condition in which it was on the night of the accident since he came to work there 23 or 24 years before (R. p. 71). And the record is bare of any evidence that any workman had ever before been injured on either washstand. That of itself is some evidence that the defendant was not negligent in the location, construction, maintenance or lighting of the washstand. Judged by the test of experience, therefore, it is plain that the washstands were properly designed, constructed, and maintained.

Augerstein v. *Jones,* 139 Pa. 183, 191.
Ship Building Works v. *Nuttale,* 119 Pa. St. 149, 158.

No evidence was introduced to show that the washstands were constructed in any respect differently from wash-

stands in use by other railroads, and this was essential even to a contention that the defendant was negligent in the construction and maintenance of the washstands.

In *Augerstein* v. *Jones,* 139 Pa. 183, the court said at page 191:

> "Not a witness was asked a single question as to what was the usual and ordinary way of constructing such machines, or whether this one was built in any respect differently from other machines of this kind. There is apparently no information on that subject to be found anywhere in this record, and *yet it is the very essence of the plaintiff's case.* Judged by the test of experience, the inference is that it was adequately built as no accident had ever occurred on it during 9 years of constant use. Where, then is the evidence of negligence in the structure of the machine? There is none."

4. The carrier owed to the decedent no duty to give him warning of obvious risks not due to its negligence.

The respondent has failed to prove that the petitioner was negligent in failing to instruct or warn the decedent (R. p. 78), as alleged in the second count of the complaint (R. p. 6), of the perfectly obvious danger of being struck by the overhang of the locomotive tender if he stood too near the edge of the washstand. That was an obvious risk which the decedent assumed.

Tiller v. *Atlantic Coast Line R.R. Co.,* 318 U.S. 54, 72.

Atchison &c. Ry. Co. v. *Wyer,* 8 F. (2d) 30, 32.

Kempton v. *Boston El. Ry.,* 217 Mass. 124, 126-127.

Pruitt v. *N. & W. R. Co.,* 188 Ky. 204.

In *Tiller* v. *Atlantic Coast Line R.R. Co.*, 318 U.S 54, the court said at page 72:

> "But neither is the carrier to be charged with those injuries which result from the 'usual risks' incident to employment on railroads—*risks which cannot be eliminated through the carrier's exercise of reasonable care.*" (Italics ours.)

In *Atchison &c. Ry. Co.* v. *Wyer*, 8 F. (2d) 30, the court said at page 32:

> "It is elementary that an employee assumes the risks ordinarily incident to his employment, so far as they are not attributable to the employer's negligence."

In *Kempton* v. *Boston Elevated Ry.*, 217 Mass. 124, the court said at pages 126-127:

> "But the duty of an employer to give warning or instructions 'exists only when there are dangers in the employment of which' the employer 'has or ought to have knowledge, and which he has reason to believe his employee does not know, and will not discover in time to protect himself from injury.' *Stuart* v. *West End Street Railway*, 163 Mass. 391, 393."

There was nothing about the design or construction of the washstands with the proximity of the tracks that was not perfectly obvious to anyone using his eyes as a reasonably prudent man should do. The petitioner owed no duty to the decedent to become eyes and ears for him.

Bedford &c. R.R. Co. v. *Brown*, 142 Ind. 659, 667.
Ward v. *Maine Central R. Co.*, 132 Me. 88.

In *Bedford &c. R.R. Co.* v. *Brown,* 142 Ind. 659, the court said at page 667:

> " 'In a case where the servant is one of mature age and experience, as in this case, *the law never imposes the duty on the master of becoming the eyes and ears for his servant, where there is nothing to prevent the servant from using his own eyes and ears to avoid danger.*' Again it is said: 'The law requires that men shall use the senses with which nature has endowed them, and when without excuse one fails to do so, he alone must suffer the consequences, and he is not excused where he fails to discover the danger if he made any attempt to employ the facilities nature has given him.' *Day* v. *Cleveland &c. Co.,* 137 Ind. 206." (Italics ours.)

In *Ward* v. *Maine Central R. Co.,* 132 Me. 88, in respect to the duty to warn, the court said:

> "The employee is presumed to see and understand all dangers that prudent and intelligent persons of the same age and experience and with the same capacity for estimating their significance would understand."

The danger or the risk of being struck by the overhang of the locomotive tender, if the decedent stood too near the edge of the washstand, was an obvious risk incident to the employment. It was, therefore, a risk which the decedent assumed, and against which the petitioner had no duty to warn the decedent.

The decedent was an intelligent man; he was a machinist's helper (R. pp. 37, 44, 92); he was familiar with the construction of the washstand, and he knew that locomotives to be stripped used only the track running between the two washstands (R. pp. 12, 36, 41, 72). He also knew

that the work of stripping was done on the northerly washstand (R. pp. 52, 63), because he had done that work before that same night, from 11 o'clock to the time of the accident (R. p. 68), about 1.45 (R. pp. 43, 56), and was seen prior to the accident doing the work of stripping engines by Emery (R. p. 44) and Bibeau (R. p. 48). He knew that engines were not stripped on the track south of the southerly washstand, where the so-called "Springfield job" was moving toward the turntable (R. pp. 37, 85), and he also knew that there was no overhang on the southerly side of the southerly washstand, since the nearer rail of that track was at least 4 feet distant. Furthermore, he knew, or could see by ordinary observation, since the area was well lighted (R. pp. 35, 71, 73, 87-91), that a locomotive backing on the track between the washstands, as locomotive 2719 was backing (R. p. 72), would overhang both the northerly and the southerly washstands.

In *Coombs* v. *Fitchburg R.R. Co.*, 156 Mass. 200, the court said at pages 201-202:

> "If any importance is to be attached to the *overhang* of the cars, he certainly knew as much about that as any one." (Italics ours.)

There was therefore no duty to warn the decedent of such an obvious risk as the danger of being struck by the overhang of the tender of the locomotive if he stood too near the edge of the washstand.

Kelley v. *New York Central R.R. Co.*, 255 Mass. 124, 127.

Atchison &c. Ry. Co. v. *Wyer*, 8 F. (2d) 30, 31.

Blacker v. *Oxford Paper Co.*, 127 Me. 228, 230, 231.

Bancroft v. *Railroad*, 67 N.H. 466, 468.

McLean v. *Studebaker Bros. Co.*, 221 N.Y. 475, 479.

In *Kelley* v. *New York Central R.R. Co.,* 255 Mass. 124, the court said at page 127:

> "The employer owes no duty to call attention to dangers which are apparent to the senses of an ordinarily intelligent person."

In *Atchison &c. Ry. Co.* v. *Wyer,* 8 F. (2d) 30, the court said at page 31:

> "The rule that it is the duty of a master to use ordinary care to warn an employee of danger in his work is not of unlimited application. Labatt, in his work on Master and Servant, states several limitations: . . .
>
> " 'Before an employer can be held liable for a failure to warn, there must be something to suggest to him that a warning is necessary. Unless this necessity was or ought to have been known to him, he is considered to be justified in acting upon the assumption that the servant understood the dangers to which he was exposed, and would take appropriate precautions to safeguard himself.' "

In *Blacker* v. *Oxford Paper Co.,* 127 Me. 228, the court said at pages 230-231:

> "Nor was there need of giving plaintiff warning or instructions concerning such danger as did exist. It was obvious to the most casual observer. It is urged that the plaintiff was inexperienced in this class of work, but there was no need of experienced knowledge here."

In *Bancroft* v. *Railroad,* 67 N.H. 466, the court said at page 468:

> "He knew as much about the danger as anyone could know, and needed no warning or caution to avoid it. The risk to which he was exposed was apparent. It was the ordinary hazard incident to his employment as the business was conducted when he entered the defendant's service, and as it had always since been conducted. The exposure to danger had not been increased by any change in the use of the side track, or by any circumstances unknown to him."

In *McLean* v. *Studebaker Bros. Co.*, 221 N.Y. 475, the court said at page 479:

> "The risks and danger were obvious and comprehensible through ordinary and reasonable care and inspection, and it was not the duty of the defendant to save him from them."

In this connection, moreover, the court instructed the jury (R. p. 110) that the railroad was not under any duty to warn its employees of risks which are obvious to any man.

The only danger was the danger created by the decedent in putting himself voluntarily and needlessly in a position of peril.

Accordingly, no liability can attach to the petitioner's failure to have the washstands marked with a white line (R. p. 39), as argued by respondent's counsel (R. p. 94), to indicate to the decedent the location of the danger zone.

The exercise of *ordinary or reasonable care* did not require the carrier to warn an intelligent workman of the risk of being struck by a backing locomotive if he failed to exercise any care for his own safety. The washstands were in the same condition in which they had been for seventeen or eighteen years, according to respondent's witness Ais-

ton (R. p. 41), and for at least twenty-three or twenty-four years, according to petitioner's witness Fournier (R. pp. 71, 72). There is no evidence that they had ever been marked to indicate the extent of the overhang of a locomotive tender, and there is no evidence that under those existing conditions any workman had ever been injured by reason of the construction of the platforms, the overhang of the locomotives, or the failure to have lines painted on the washstands.

Moreover, there is nothing to show that a line painted upon the southerly washstand would have prevented the accident. Voluntarily and without need the decedent put himself so close to the edge of the southerly washstand, where he had no duty to perform, that the overhang of a backing locomotive was bound to hit him. It was his duty, in stripping a locomotive after it came to a stop (R. pp. 33, 41, 61), to do the work on the right-hand side, the engineer's side, that is, north of the track (R. pp. 52, 63). There is no evidence that stripping was ever done on the southerly washstand. Nor is that all. Instead of looking, as required by the safety rules (R. p. 81), for the approach of the engine which he knew he was going to strip (R. p. 41) on the northerly washstand, he stood with his back to the locomotive which hit him (R. p. 37), watching another locomotive, the "Springfield job" (R. pp. 37, 85), on the track to the south of the southerly washstand. This track was at least 4 feet distant from the southerly washstand (R. p. 13, and Plan, Ex. 1, R. p. 113) on which Meech was standing (R. pp. 28-29). So inattentive was Meech to his surroundings that he not only failed to hear the bell on locomotive 2719 (R. pp. 54-57, 59-60, 83, 86), but also failed to hear the warning (R. pp. 31, 35) which Kurtyka shouted to him from a distance of 50 to 75 feet away (R. pp. 30, 34). The undisputed evidence shows that stripping was done only on the engineer's or hostler's side of the locomotive as

it was backed (R. pp. 52, 63), that is, on the washstand on the north of the track (R. p. 63). Meech knew that fact because he had been stripping locomotives (R. pp. 44, 48, 68) from 11 o'clock until the time of the accident at 1.45 (R. pp. 56, 80). *He knew, therefore, that he had no duty to perform on the southerly washstand, where he was standing but not working at the time he was struck* (R. pp. 28, 34). The accident was due solely to the decedent's own negligence.

Southern Pacific Co. v. *Seley,* 152 U.S. 145, 156.
Baltimore & Ohio R. Co. v. *Berry,* 286 U.S. 272, 276.
McGivern v. *Northern Pacific Ry. Co.,* 132 F. (2d) 213, 219.
Pittsburgh &c. R.R. Co. v. *Sentmeyer,* 92 Pa. St. 276, 281-282.
Lenz v. *Union Pacific R.R. Co.,* 128 Neb. 99, 102.
Bedford &c. R.R. Co. v. *Brown,* 142 Ind. 659, 667.

In *Southern Pacific Co.* v. *Seley,* 152 U.S. 145, the court said at page 156:

> "Recklessness could hardly go further. The evidence would warrant no other conclusion than that he took the risk of the work in which he was employed, and that his negligence in the course of that work was the direct cause of his death. The court should have directed a verdict for the defendant."

In *Baltimore & Ohio R. Co.* v. *Berry,* 286 U.S. 272, the court said at page 276:

> "If negligence caused the injury, it was exclusively that of the respondent [plaintiff]. Proof of negligence

by the railroad was prerequisite to recovery under the Federal Employers' Liability Act."

In *McGivern* v. *Northern Pacific Ry. Co.*, 132 F. (2d) 213, the court said at page 219:

"Here the negligence was that of McGivern alone. It was his failure to act that resulted in his injury and defendant cannot be held liable therefor."

In *Pittsburgh &c. R.R. Co.* v. *Sentmeyer*, 92 Pa. St. 276, the court said at pages 281-282:

"No duty of the railroad called him to this position; he chose it of his own free will; he put himself in the place of danger and the direct consequence of this, his own voluntary act, was the loss of his life. For this surely the company was not liable, for it required of him no such risk."

In *Lenz* v. *Union Pacific R.R. Co.*, 128 Neb. 99, the court said at page 102:

"It is absolutely true that, *had he looked in the direction from which the train was coming,* while he was descending the ladder, *he would not have failed to see the approaching train, and the danger in going upon or in close proximity to the main line track was obvious.* From the entire record, it seems clear that the plaintiff's injuries resulted from his own lack of caution and care." (Italics ours.)

In *Bedford &c. R.R. Co.* v. *Brown*, 142 Ind. 659, the court said at page 667:

" 'In a case where the servant is one of mature age and experience, as in this case, the law never imposes

the duty on the master of becoming the eyes and ears for his servant, where there is nothing to prevent the servant from using his own eyes and ears to avoid danger.' Again it is said 'The law requires that men shall use the senses with which nature has endowed them, and when without excuse one fails to do so, *he alone must suffer the consequences,* and he is not excused where he fails to discover the danger if he made any attempt to employ the facilities nature has given him.' Day v. Cleveland &c. Co., 137 Ind. 206."

5. Upon well-settled principles of law it is clear that the Circuit Court of Appeals was in error in adopting a false standard of duty and false test of liability in suggesting in its opinion (R. p. 127) that the petitioner "might have painted lines on the platforms of its washstand to indicate the extent to which locomotives overhang them, and thus to warn persons on the platforms of the danger incident to standing near their inner borders, or it might even have set the platforms of its washstand back from the tracks far enough to prevent locomotives from overhanging them at all."

The painting of a line on the platform, as suggested by the Circuit Court of Appeals (R. p. 127), could only be for the purpose of warning the decedent of the extent of the overhang. But the decedent already knew of that danger from the fact that he was a machinist's helper (R. pp. 37, 44, 92) and therefore knew that every locomotive had an overhang, and from the further fact that he had been working on the northerly platform, which was brightly illuminated (R. p. 125), for several hours before the accident (R. pp. 44, 48), and therefore had an opportunity to see the extent of the overhang and the danger of standing too near the edge of either washstand.

The risk was an obvious one, and accordingly the District Court gave the following instruction to the jury (R. p. 110): "I am willing to say that the railroad is not under any duty to warn its employees of risks which are obvious to any man."

The fact that the Circuit Court of Appeals adopted a false standard of duty and false test of liability is further evidenced by the suggestion made in its opinion (R. p. 127) that the carrier "might even have set the platforms of its washstand back from the tracks far enough to prevent locomotives from overhanging them at all." The petitioner owed no duty to the decedent to make a change in its platforms as suggested. This is an engineering problem, which is not the basis for a finding of negligence, particularly in view of the fact that this condition had existed for about twenty years (R. pp. 41, 71), without injury to any employee. This question has already been discussed earlier in this brief at pages 46 to 48, inclusive.

On the established facts and well-settled principles of law the case should have been withdrawn from the jury on the second count of the complaint.

III. The Circuit Court of Appeals was in error in ruling (R. p. 126) that "there is an 'evidentiary basis' for submitting the issue of the defendant's causal negligence to the jury, and hence that our 'function is exhausted'" (Specification of Errors No. 8).

In support of this ruling the Circuit Court of Appeals cites *Lavender* v. *Kurn et al.*, decided March 25, 1946 (Law. Ed. Adv. Op. vol. 90, No. 11, p. 692), in which this court said: "And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable."

In *Tiller* v. *Atlantic Coast Line R.R. Co.*, 318 U.S. 54, which is also cited by the Circuit Court of Appeals in its opinion (R. p. 125), this court said at page 68:

> " 'Where the facts are in dispute, and the evidence in relation to them is that from which fair-minded men may draw different inferences,' the case should go to the jury."

In the case at bar there is no question of possible inferences from facts in dispute. The sole question here is whether on the basis of undisputed facts the petitioner was guilty of a breach of duty to the decedent as alleged in either the first or the second count of the complaint.

The other cases cited in the opinion (R. p. 125) are so clearly distinguishable on their facts as to afford no support for the reasoning of the Circuit Court of Appeals.

IV. The Circuit Court of Appeals was in error in ruling (R. p. 127) that the petitioner's requests for instructions numbered 19 and 27 were properly denied by the District Court.

See specifications of errors numbered 9 and 10.

The 19th request reads as follows:

> "19. The defendant owed no duty to have a lookout stationed on the rear end of the tender as it was backing toward the washstand."

The error in denying this request has already been discussed in this brief at pages 34 to 38, inclusive.

The 27th request reads as follows:

> "27. The defendant owed no duty to blow a whistle, it would only add to the confusion."

The error in denying this request has already been discussed in this brief at pages 27 to 31, inclusive.

1. The instructions requested bore on vital issues of negligence, and they were applicable to the facts.

2. The refusal of the District Court to give the 19th request for instruction permitted the respondent's counsel to make the following argument to the jury (R. pp. 97-98):

> "There is no evidence here of any scarcity of laborers up there, or any scarcity of engine-men, locomotive engineers or hostlers, no evidence of that here. And if there wasn't, was there any reason why another person couldn't have been on the left side of that cab, *or a person be on the rear of the tender,* even walking in back of the tender, and there would have been no accident here. Any one of those steps, I submit, would have been sufficient to prevent the taking of a life under the circumstances that existed at this particular time.
>
> "So that we submit that with reference to the question of the sufficiency or the reasonably safe character of the washstand, and the evidence with reference to Moquin, with reference to *there being no protection so far as anybody on the rear of the tender is concerned,* or anybody on the left side, that there was negligence on the part of the defendant in this particular case."

And further, at pp. 99-100 of the record:

> "I submit, Mr. Foreman and gentlemen of the jury, that there shouldn't be any great difficulty on your part in coming to the conclusion that the defendant was negligent in this case, by reason of the fact that it failed

to furnish the deceased with a reasonably safe place to work, that it had failed to warn him of the dangers incidental to working on that place where he was working for the first time, that it was negligent in failing to man the locomotive with sufficient men so that both sides could be covered or *somebody on the rear of the tender,* that it was negligent in Moquin's operating the locomotive as he did, without taking steps to make sure that there was nobody upon that particular platform near the track."

This may well have misled the jury into believing that the petitioner was negligent if it could have prevented the accident by having a man stationed on the rear of the tender or walking on the track in advance of the locomotive, or by taking some other precautionary measure, although it owed no such duty to the decedent. This is not the test of negligence.

Augerstein v. *Jones,* 139 Pa. 183, 187-188, 192.
Titus v. *Bradford &c. R.R. Co.,* 136 Pa. 618.
Hewitt v. *F. & P.M. R.R. Co.,* 67 Mich. 61, 72.

This erroneous test of liability may well have been decisive of the case. It may have been the ground upon which the jury found its verdict.

It may be contended that the petitioner did not complain in the District Court of this argument addressed to the jury. The short answer to this contention is that petitioner's counsel is not complaining of the argument addressed to the jury, but of the ruling of the District Court that permitted such argument. Reference to the argument is made solely to indicate how prejudicial to the petitioner the court's ruling was.

In the case of *Curtis* v. *Boston Ice Co.,* 237 Mass. 343, the court erroneously admitted, over the objection of the de-

fendant, certain incompetent evidence, and the court there said at page 353:

> "It did tend to prejudice the defendant, as will appear by reference to the *argument* addressed to the jury concerning its effect. While no exception was taken to that appeal, it may be referred to in considering the possibility of the claimed effect of this evidence, which prejudiced the substantial rights of the defendant."

3. It follows that the refusal of the District Court to give these instructions was prejudicial error and required the Circuit Court of Appeals to reverse the judgment of the District Court.

Erie R.R. Co. v. *Gallagher,* 255 Fed. 814, 817.
Jones v. *New York, New Haven & Hartford R.R. Co.,* 275 Mass. 139, 144.
Kingsbury v. *Railroad,* 79 N.H. 203.
Chicago &c. R.R. Co. v. *Kroloff,* 217 Fed. 525, 528, and cases cited.
Bogert v. *Corcoran,* 260 Mass. 206, 209.

The rule just stated has not been changed by the provisions of § 269 of the Judicial Code, as amended (28 U.S.C. § 391).

McCandless v. *United States,* 298 U.S. 342, 347-348.
United States v. *River Rouge Improvement Co.,* 269 U.S. 411, 420.
Williams v. *Great Southern Lumber Co.,* 277 U.S. 19, 26.
Lynch v. *Oregon Lumber Co.,* 108 F. (2d) 283, 285-286.

New York & Porto Rico S.S. Co. v. *Garcia,* 16 F. (2d) (1st Cir.) 734, 739.
Baltimore & Ohio R.R. v. *Moore,* 13 F. (2d) 364, 365.

The petitioner's rights were properly saved by its exception (R. p. 110) to the court's refusal to grant its request. No exception to the charge was necessary.

Connecticut Life Ins. Co. v. *Hillmon,* 188 U.S. 208, 213.
Peirson v. *Boston Elevated Ry. Co.,* 191 Mass. 223, 234.
Ginzler v. *Birmingham,* 6 Ala. App. 666.

V. The Circuit Court of Appeals was in error in affirming the judgment of the District Court (Specification of Error No. 11).

The verdict for the respondent was a general one, and the jury may have found its verdict on the first count or on the second count of the complaint, or it may have found for the respondent on some ground of negligence which should have been withdrawn from its consideration under the respondent's motion for a directed verdict on each count (R. pp. 7-8), or under the petitioner's requests for specific instructions (R. p. 118).

Under such circumstances it is well-settled law that the judgment should be reversed.

Wilmington Star Mining Co. v. *Fulton,* 205 U.S. 60, 79.
Schilling v. *Del. & H. R.R. Corp.,* 114 F. (2d) 69, 72.
Christian v. *Boston & Maine R.R.,* 109 F. (2d) 103, 105.
Chicago &c. R. Co. v. *Kroloff,* 217 Fed. 525, 528.

Fairman v. *B. & A. R.R.*, 169 Mass. 170, 178 (last paragraph).
Farr v. *Whitney*, 260 Mass. 193, 197.
Martin v. *Boston Elevated Ry.*, 214 Mass. 456.
Kingsbury v. *Railroad*, 79 N.H. 203.

Conclusion.

The errors committed by the Circuit Court of Appeals have in effect converted the Federal Employers' Liability Act into a workmen's compensation act not based upon negligence, and have made the carrier an insurer of the safety of its employees. If allowed to stand, this judgment would constitute a miscarriage of justice.

Wherefore the petitioner prays that its petition for a writ of certiorari be granted.

Respectfully submitted,
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